

- (2) Did the Administrative Law Judge exceed his jurisdiction in declaring K.A.R. 51-9-6 void?
- (3) What is the nature and extent of claimant's injury and disability?
- (4) Is medical evidence necessary in order for claimant to prove his entitlement to a permanent disability?
- (5) Does K.S.A. 44-519 act to exclude the report from an independent medical examination ordered by an administrative law judge under K.S.A. 44-516?

Respondent raised the following issue in its brief:

Can claimant prove his entitlement to temporary total disability compensation without supporting medical evidence?

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Having reviewed the entire evidentiary record filed herein, the Appeals Board makes the following findings of fact and conclusions of law:

FINDINGS OF FACT

The parties stipulated that claimant is entitled to a scheduled injury to his right lower leg. At the September 29, 1998, regular hearing, the parties also acknowledged that an examination of claimant was done at claimant's attorney's request by Dr. Poppa and a rating report was issued. However, Dr. Poppa's deposition was never taken.

The regular hearing transcript further reflected that the Judge appointed Dr. Badwey to perform an independent medical examiner and that Dr. Badwey determined that claimant suffered a 29 percent functional impairment to the lower leg. There was no stipulation by the parties that Dr. Badwey's or Dr. Poppa's reports could be included in the record, merely the statement by the Administrative Law Judge regarding the examination, the appointment and Dr. Badwey's findings.

The Administrative Law Judge's Order for the independent medical examination states that the appointment "is made pursuant to K.S.A. 44-516" and the evaluation on claimant is "for rating purposes and restrictions, if any."

Claimant, in his submission letter of January 22, 1999, to the Administrative Law Judge, listed the February 19, 1998, independent medical examination report of Dr. Badwey as part of the record. Respondent, in its February 3, 1999, submission letter to the Administrative Law Judge, objected to the inclusion of Dr. Badwey's report, citing K.S.A. 44-519.

Without the report of Dr. Badwey, there is no evidence in the record regarding what, if any, functional impairment claimant may have sustained to his lower extremity. The Administrative Law Judge in the Award, citing K.S.A. 44-519, excluded the report of Dr. Badwey and, therefore, denied claimant's request for permanent partial disability.

The Administrative Law Judge went on to declare K.A.R. 51-9-6 to be in conflict with K.S.A. 44-519 and "as such is void."

The appointment of Dr. Badwey as an independent medical examiner was pursuant to K.S.A. 44-516 which states:

In case of a dispute as to the injury, the director, in the director's discretion, or upon request of either party, may employ one or more neutral health care providers, not exceeding three in number, who shall be of good standing and ability. The health care providers shall make such examinations of the injured employee as the director may direct.

K.S.A. 44-519 states:

No report of any examination of any employee by a health care provider, as provided for in the workers compensation act and no certificate issued or given by the health care provider making such examination, shall be competent evidence in any proceeding for the determination or collection of compensation unless supported by the testimony of such health care provider, if this testimony is admissible, and shall not be competent evidence in any case where testimony of such health care provider is not admissible.

K.A.R. 51-9-6 states:

If a neutral physician is appointed, the written report of that neutral physician shall be made a part of the record of hearing. Either party may cross-examine each neutral physician so employed. The fee of the neutral physician giving such testimony shall be assessed as costs to a party at the administrative law judge's discretion.

CONCLUSIONS OF LAW

Pursuant to K.S.A. 1997 Supp. 77-415(4), a regulation has the force of law.

There is, however, a conflict between K.A.R. 51-9-6 and K.S.A. 44-519. The administrative regulation allows the report of a neutral physician to be made a part of the record of hearing. When a regulation is in conflict with a statute, the statute must be followed and the regulation disregarded. Lakeview Village, Inc., v. Board of Johnson County Comm'rs., 232 Kan. 711, 659 P.2d 187 (1983).

Here, however, the regulation does not stand alone. K.S.A. 44-516 gives the Director the authority to employ one or more neutral health care providers to make such examinations of the injured party as the Director may direct. In this instance, the Administrative Law Judge directed Dr. Badwey to determine claimant's functional impairment and any restrictions which may be appropriate.

In Wiley v. Dillon Companies, Inc., WCAB Docket No. 205,235 (March 1999), and Haataja v. General Riggers & Erectors, Inc., WCAB Docket No. 173,814 (March 1997), the Board was asked to consider K.S.A. 44-510e, which allows the Administrative Law Judge to appoint an independent health care provider when there is a dispute regarding claimant's functional impairment in general body disability disputes. The health care provider, providing an evaluation pursuant to K.S.A. 44-510e, shall issue an opinion regarding claimant's "functional impairment," and this opinion "shall be considered by the administrative law judge in making the final determination."

As K.S.A. 44-510e mandates that the opinion of the physician shall be considered for the purpose of functional impairment, the question becomes whether the exclusions of K.S.A. 44-519 would apply. This statutory conflict has been addressed by the Kansas Court of Appeals on several occasions. The Court of Appeals has ruled that K.S.A. 44-510e(a) creates "a narrow exception to the general rules of K.S.A. 44-519." Sims v. Frito Lay, Inc., 23 Kan. App. 2d 591, 933 P.2d 161 (1997); see also McKinney v. General Motors Corp., 22 Kan. App. 2d 768, 921 P.2d 257 (1996). The Appeals Board has also addressed this conflict, not only in the context of K.S.A. 44-510e, but also in dealing with K.S.A. 44-516. In Wiley v. Dillon Companies, Inc., *supra*, the Appeals Board found little distinction between a report generated under K.S.A. 44-510e and one generated pursuant to K.S.A. 44-516. In applying the Sims and McKinney logic, the Appeals Board allowed the independent medical examination report of Dr. Lucas to be admitted without his testimony.

Here, the independent medical examination ordered by the Administrative Law Judge was, in part, specifically for the purpose of assessing claimant's functional impairment. Under K.S.A. 44-510e, when dealing with a general body disability, this report would be allowed into the record. In this instance, the Board finds there should be no distinction between a report ordered under K.S.A. 44-516 for a scheduled injury under K.S.A. 44-510d and one ordered under K.S.A. 44-510e. The legislative intent appears to preclude the application of K.S.A. 44-519 to neutral physician reports ordered by an

administrative law judge. Therefore, the report of Dr. Badwey shall be considered for the purpose of this award. This renders moot claimant's third issue regarding whether medical evidence is needed for claimant to prove permanent disability.

As the report of Dr. Badwey is the only report in evidence, the Appeals Board finds that claimant is entitled to a 29 percent permanent partial disability to the right lower extremity at the level of the lower leg, including the foot and ankle.

Claimant testified, and his testimony is uncontradicted, that he was unable to engage in any substantial and gainful employment for between 8 and 10 weeks after his fall and hospitalization, plus an additional 2 weeks during which he underwent physical therapy. The Administrative Law Judge awarded claimant 12 weeks temporary total disability compensation. The Appeals Board finds, based upon the evidence in the record, that this should be affirmed.

AWARD

WHEREFORE, it is the finding, decision, and order of the Appeals Board that the Award of Administrative Law Judge Steven J. Howard dated March 3, 1999, should be, and is hereby, modified, and claimant, Joseph Lee Saxon, is granted an award against the respondent, U. S. Home Services, and its insurance carrier, Commercial Union Insurance Companies, for an injury occurring on June 14, 1995, and based upon an average weekly wage of \$1,009.46 for a 29 percent permanent partial disability to the right lower extremity.

Claimant is entitled to 12 weeks of temporary total disability compensation at the rate of \$319 per week totaling \$3,828. Thereafter, claimant is entitled to 51.62 weeks of permanent partial disability compensation at the rate of \$319 per week totaling \$16,466.78 for a total award of \$20,294.78. As of the date of this Award, the entire amount is due and owing and ordered paid in one lump sum minus any amounts previously paid.

The claimant's outstanding medical expenses are ordered paid pursuant to the Administrative Law Judge's finding number 6.

The fees necessary to defray the expense of the administration of the Workers Compensation Act are hereby assessed against the respondent and its insurance carrier to be paid as follows:

Metropolitan Court Reporters, Inc.
Transcript of Proceedings

\$ 76.60

Richard Kupper & Associates	
Continuation of Regular Hearing	\$269.10
Deposition of Joseph Lee Saxon	\$ 73.95
Transcript of Motion Hearing	\$ 84.10

IT IS SO ORDERED.

Dated this ____ day of March 2000.

BOARD MEMBER

BOARD MEMBER

BOARD MEMBER

c: J. Paul Maurin, III, Kansas City, KS
Donald J. Fritschie, Overland Park, KS
Kip A. Kubin, Overland Park, KS
Steven J. Howard, Administrative Law Judge
Philip S. Harness, Director